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No. 98-21

In The

# Supreme Court of the United States

October Term, 1997

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., LARRY H. LOVITSCH and THOMAS R. VALAIKA,

*Petitioners,*

*vs.*

MARCIA M. ROUBIK,

*Respondent.*

*On Petition for Writ of Certiorari to the Supreme Court of Illinois*

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the inclusion of a New York choice of law provision in an arbitration agreement prohibits the arbitrators from making an award of punitive damages.

2. Whether under the Federal Arbitration Act when reviewing an arbitrator's jurisdictional decision the court can apply a *de novo* standard of review or it must in all cases defer to the decision of the arbitrator as to the scope of his own jurisdiction.

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## STATEMENT OF THE CASE

Petitioners' Statement of the Case contains numerous legal and factual misstatements and omissions. Those deemed "relevant" are discussed below within the context of the arguments presented herein.

## REASONS FOR DENYING THE WRIT

### I.

### PETITIONERS OFFER NO REASON WHY THE COURT SHOULD RECONSIDER SETTLED PRECEDENT CONTROLLING THE OUTCOME OF THIS CASE.

While this Petition may have been timely in 1994, since then, this Court has conclusively resolved the issues raised by this case. Those decisions resolved the prior conflicts among the various Federal Courts of Appeals and brought some badly needed uniformity to this area of the law. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995) and *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995).

As will be shown below, the suggestion that these issues need to be reviewed by this Court or that the Illinois Supreme Court misapplied the principles of these decisions is absolutely devoid of merit.[1]

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1. Petitioners do not contend that the Illinois Supreme Court improperly stated any rule of law.

## II.

## THE ISSUES INVOLVED IN THIS CASE ARE PURELY LEGAL QUESTIONS.

In the trial court proceedings, the court stated, "There is no dispute as to any material fact."[2] The Illinois Court of Appeals stated, "We note that as this case involves purely legal questions our review of it is *de novo*."[3] While challenging the de novo standard of review, Petitioners never challenged the Court's holding that the case involved purely legal issues. In the decision below, the Illinois Supreme Court stated, "As noted in *Mastrobuono*, the Court addressed the same issue presented in this case whether the inclusion of a New York choice-of-law provision in an arbitration agreement prohibited the arbitrators from awarding punitive damages."[4] The Court also correctly noted, "The respondents do not contend that the parties in this case agreed to allow the arbitrators to decide questions of arbitrability."[5]

Notwithstanding the fact that the factual argument concerning Respondent's conduct and the briefs filed by the parties during the NASD proceedings was clearly abandoned by Petitioners at least two years ago, Petitioners now erroneously suggest that this Court should review documents[6] that are

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2. *See* Petition herein. App. p. 36.

3. *See Roubik v. Merrill Lynch,* 225 Ill. App. 3d 217, 220 Ill. Dec. 764, 674 N.E. 2d 35 at 36 (1st Dist. 1997), Petition herein, App. p. 29.

4. *See Roubik v. Merrill Lynch,* 181 Ill.2d 373, 692 N.E. 2d 1167, 230 Ill. Dec. 1 (1998), Petition herein, App. p. 12.

5. *Id.* at App. p. 14.

6. *See* Petition herein, App. p. 50-144.

outside the record of this case and which were not submitted by either party at the trial court, appellate court or Illinois Supreme Court level. This Court has made it clear that fact-finding as a matter of original jurisdiction is not a function of this Court. *See Garver Tank & Mfg. Co. v. Linde Air Products Co.*, 70 S. Ct. 854, at 857-858, 339 U.S. 605, 94 L. Ed. 1097 (1950).

In *First Options, supra,* p. 1, this Court noted,

> But merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, i.e., a willingness to be effectively bound by the arbitrator's decision on that point . . .

115 S. Ct. at 1925.

The Court should also recognize that Petitioners' position here is the same as that unsuccessfully asserted by Aircraft Braking Systems Corp. in *Aircraft Braking Systems Corp. v. Local 856, Intern. Union, United Auto., Aerospace and Agr. Implement Workers, UAW*, 97 F.3d 155, (6th Cir. 1996), *cert. den.*, 117 S. Ct. 1311. There, the court held as follows:

> The only real difference between this case and *First Options* is that the party strongly protesting the arbitrator's authority to decide the dispute (Aircraft Braking Systems) *won* in arbitration. In *First Options*, because Kaplan lost at arbitration on his argument that there was no agreement to arbitrate, he maintained consistently on appeal that he did not submit the issue of arbitration to the arbitrator. Here, Aircraft Braking Systems had the good fortune to win its argument that no agreement existed, and is now claiming that it happily submitted the issue of

arbitrability to the arbitrator. Aircraft Braking Systems cannot have it both ways. Taking a passage from the Supreme Court in *First Options*, we note that, "[I]nsofar as [Aircraft Braking Systems was] forcefully objecting to the arbitrator deciding [its] dispute . . . one naturally would think that [it] did not want the arbitrator to have binding authority over [it]." *First Options*, __ U.S. at __, 115 S. Ct. at 1925. Accordingly, we hold that the parties did not submit the issue of arbitrability to the arbitrator. 97 F.3d at 161.

## III.

## THE DECISION BY THE ILLINOIS SUPREME COURT IN THIS CASE IS IN FULL ACCORD WITH RELEVANT AUTHORITY AND DOES NOT CREATE NEW LAW.

Having previously strenuously argued in the trial court[7] that the Seventh Circuit's *Mastrobuono*[8] decision, which applied a de novo standard of review, was dispositive of the issues in this case, Petitioners now contend that this Court's decision in the *Mastrobuono* case cannot be applied to vacate the award in this case. Petitioners argue that despite the ruling by this Court, the Illinois Supreme Court is powerless to act in accordance with that ruling because in that case, the NASD arbitrators actually completed the arbitration and awarded punitive damages of $400,000, but in this case, while finding that punitive

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7. *See* Respondent's Memorandum of Law Regarding Additional Authority p. 3, R. C493. *See also* Petition herein, p. 5.

8. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 20 F.3d 713 (7th Cir. 1994), *reversed at* 514 U.S. 52, 131 L. Ed. 2d 76, 115 S. Ct. 1212 (1995).

damages "should be awarded"[9] the NASD panel, unsure of its authority to do so under New York law, declined to fix an amount and enter and award of punitive damages in that amount.

Petitioners are in effect arguing that if it were this case rather than *Mastrobuono* that this Court heard, that this Court and the Illinois courts would be powerless to act and would not have rendered the decision which this Court and the Illinois courts have made. As will be discussed below, Petitioners' position is totally without merit.

If Petitioners' argument was correct, each time that an arbitration panel concluded that it had jurisdiction to award punitive damages, the defendants could obtain an independent de novo review of the issue as to whether in fact the arbitrators had exceeded their authority by making an award of punitive damages.[10] However, should they instead decline to make an award of punitive damages because they are unsure of their authority to do so, then that "decision" must be deferred to, is not independently reviewable and the courts are powerless to act. Fortunately, the law is not as unfairly one-sided as Petitioners wish it to be.

Federal courts have long recognized that under the FAA[11], either before or after arbitration proceedings have taken place, that it is for the courts to decide on an independent, *de novo* basis whether the arbitrators have the authority to decide a specific issue.

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9. *See* award R. C41-C42. *See also* Petition herein, p. 5.

10. *See Mastrobuono, supra*, note 8.

11. The Federal Arbitration Act 9 U.S.C. § 1 *et seq.* referred to herein as FAA.

The courts decide the arbitrability issue as this Court in the *Mastrobuono* case, *supra*, p. 1, and as the Illinois Supreme Court in this case has done, by independently reviewing the arbitration agreement between the parties and deciding whether the parties agreed to arbitrate that specific issue (i.e., do the arbitrators have the authority to decide that issue). Petitioners have consistently refused to recognize that there is a fundamental and critical difference between an arbitrator saying, "I don't believe I have the authority to decide that issue," (i.e., no jurisdiction) and saying, "Based on the merits of the claim I find for the plaintiff in the amount of $ . . ." (i.e., a decision on the merits). This is a case of the former and not the latter. Federal courts have long recognized the distinction between an arbitrator's jurisdictional decision and a ruling on the merits of the underlying claim.

Under the Federal Arbitration Act, it has consistently been held that the issue of arbitrability is to be determined by the courts and not by the arbitrators. In *AT&T Technologies, Inc. v. Communication Workers of America*, 106 S. Ct. 1415, 475 U.S. 643, 89 L. Ed. 2d 648 (1986), this Court held:

> Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator . . . "Under our decisions, whether or not the company was bound to arbitrate, *as well as what issues it must arbitrate*, is a matter to be determined the court on the basis of the contract entered into by the parties." . . . The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. *Id.*, at 546-547, 84 S. Ct., at 912-913 (citations omitted).

475 U.S. at 649 (emphasis added).

*See also Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241, 82 S. Ct. 1318, 1320-21, 8 L. Ed. 2d 467, 465-66 (1962); *Necchi v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 693 (2d Cir. 1965), *cert. den.*, 383 U.S. 909, following *Atkinson, supra.* (holding that the principle is the same, regardless of whether the case is decided under the Labor Management Relations Act or the Federal Arbitration Act, 348 F.2d 693 at 696); *International Union, UAW v. General Electric Co.*, 714 F.2d 830, 831 (8th Cir. 1983); *Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 v. Royal Center, Inc.*, 754 F.2d 835, 838 (9th Cir. 1985); *Life of America Insurance Co. v. Aetna Life Insurance Co.*, 744 F.2d 409, 413 (5th Cir. 1984); *Local 232, Allied Industrial Workers v. Briggs & Stratton Corp.*, 837 F.2d 782, 784 (7th Cir. 1988); *Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70 v. Interstate Distributor Co.*, 832 F.2d 507, 509 (9th Cir. 1987); and *Daisy Manufacturing Co., Inc. v. NCR Corp.* 29 F.3d 389 (8th Cir. 1994) (Where the Court of Appeals would decide the issue of whether an arbitration clause covered the parties dispute even though the District Court had not adjudicated that issue).

The power of the court to determine the issue of arbitrability is the same whether the court is asked to resolve this issue before or after arbitration proceedings have taken place. This is especially true when the jurisdictional decision is that a specific dispute will *not* be considered on its merits by the arbitrators.

In *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 249 v. Western Pennsylvania Motor Carriers Association*, 574 F.2d 783 (3d Cir. 1978) the court held as follows:

> However, whether the arbitrator has jurisdiction over a particular dispute — i.e. whether the controversy is arbitrable — is a question for the court to decide. A *jurisdictional decision by an arbitrator that he has authority to decide a dispute is subject to a much broader and more rigorous judicial review. Bieski v. Eastern Automobile Forwarding Co., supra*; *Torrigton Co. v. Metal Products Workers Local* 1645, 362 F.2d 677, 680 (2nd Cir. 1966). See *John Wiley & Sons v. Livingston*, 376 U.S. 543, 84 S. Ct. 909, 11 L. Ed. 2d 370 (1964); *Humphrey v. Moore*, 375 U.S. 335, 84 S. Ct. 363, 11 L. Ed. 2d 370 (1964). As we said in Bieski: "*If however, the private decision complained of is a "jurisdictional" one — that a certain dispute will not be considered on its merits by the private decision maker — then the court is a proper forum to review this decision on the basis of its analysis of the contract entered into by the parties.*" 396 F.2d at 38. (emphasis added)

The court later noted; "since this is a jurisdictional question we may independently decide the reasonableness of ECJAC's interpretation of the term 'error' ", *Id.* at 788.

If this Court were to follow Petitioners' suggested method of review, the Court would be led into the same type of error as was found by the First Circuit Court of Appeals in *Mobil Oil Corporation v. Local 8-766, Oil Chemical and Atomic Workers International Union*, 600 F.2d 322 (1st Cir. 1979). There the district court was asked to vacate an arbitration award entered in a labor dispute. While the district court confirmed the arbitration award, the Appellate Court, following the authorities cited above, held: (a) that the District Court did not meet it obligation to make an *independent* determination as to whether the underlying dispute was arbitrable; and (b) since arbitration

was a matter of contract the Court of Appeals could itself independently determined whether the dispute was arbitrable.

The court held as follows:

> We agree with Mobil that *the district court limited itself to a review of the arbitrator's decision. The only logical interpretation that can be given to the italicized sentence is that the district court misunderstood its duty to decide independently the questions of arbitrability and erroneously deferred to the arbitrator's determination that the subcontracting dispute was arbitrable.* Its citation to page 599 of *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960), makes it evident *that the court blended the issue of arbitrability with the deference due the arbitrator's interpretation of the contract. In Enterprise Wheel,* the Court stated at 599, 80 S. Ct. at 1362:
>
> > As we there emphasized [referring to *United Steelworkers of America v. American Manufacturing Co.* 363 U.S. 564 [80 S. Ct. 1343, 4 L. Ed. 2d 1403] (1960)], the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

*This, however, referred only to the second step of the court's review process. The first step is a determination of the arbitrability of the dispute. While the court may refer to an arbitrator's discussion on arbitrability in order to aid its determination. F & M Schaeffer Brewing Co. v. Local 49, International Union of United Brewery Workers,* 420 F.2d 854, 856 (2d Cir. 1970); *Garlick Funeral Homes, Inc. v. Local 100, Service Employees International Union,* 413 F. Supp. 130, 134 (S.D.N.Y. 1976), *it must make its own independent determination of this threshold issue.* There is no language in the court's opinion indicating that this obligation was met.

This, however, does not require a remand. Since arbitration is a matter of contract, *Gateway Coal Co. v. United Mine Workers of America,* 414 U.S. 368, 374, 94 S. Ct. 629, 38 L. Ed. 2d 583 (1974), *Local 205, UE v. General Electric Co., supra* 233, F.2d at 101, *this court can, itself, determine this question of law.* In *Necchi v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 693 (2d Cir. 1965), *cert. denied,* 383 U.S. 909, 86 S. Ct. 892, 15 L. Ed. 2d '664 (1966), the court found that the district court had not met its obligation to decide whether the dispute was arbitrable. Rather than remand, however, the court decided the issue itself. Writing for the court, Judge, now Justice, Marshall wrote:

> The District Court failed to fulfill this duty and we thus have the alternative of making the determination for ourselves or remanding to the District Court. In respect to all the items, even on the meager record

> before us, the question of arbitrability seems so clear that no useful purpose would be served by leaving the question to be resolved by the District Court upon further proceedings, and in order to expedite this litigation, we will rule on the arbitrability of each of the items.

*Id.* at 697.

> The factual record here is complete and the legal issue is so clear that nothing would be gained and much lost in terms of time and additional expenses by a remand. 600 F.2d at 325, 326. (emphasis added)

Under Sec. 10(d) of the Federal Arbitration Act, 9 U.S.C.A. § 10(d), an award can be vacated and the matter remanded to the arbitrators where a "definite award upon the subject matter submitted was not made." *See Edward D. Jones & Co. v. Sorrells,* 957 F.2d 509 (7th Cir. 1992). There, the court affirmed the district court's order *vacating* in part an NASD arbitration award based upon a decision by the arbitrators defining their jurisdiction. The court applied *AT&T Technologies, supra,* p. 6., and held:

> Unless the parties clearly and unmistakably provide otherwise the question of whether the parties agreed to arbitrate is to be decided by the Court, not the arbitrator . . .
>
> Thus, whether Section 15 bars a claim from submission to the arbitrators is for the court to decide, *and it is irrelevant whether the arbitrators have already ruled on the question.*

957 F.2d at 513 (emphasis added).

Following the precedents discussed above, this Court in 1995 decided *Mastrobuono, supra,* p. 1, and *First Options v. Kaplan, supra,* p. 1. For a full discussion of those cases, *See* Opinion of the Illinois Supreme Court herein at App. pp. 6-15 of the Petition.

In decisions following *First Options,* Federal Courts of Appeals have consistently refused to imply any agreement to arbitrate arbitrability and have decided questions of arbitrability on a de novo basis.

In *McLaughlin Gormley King Co. v. Terminix Intern. Co., L.P.*, 105 F.3d 1192 (8th Cir. 1997), the court held:

> In this case, neither the arbitration clause nor any other provision in the 1984 contract between Terminix and MGK clearly and unmistakably evidenced the parties' intent to give the arbitrator power to determine arbitrability. The arbitration clause made no mention of a "controversy" over arbitrability. Terminix argues that the federal policy favoring arbitration requires that the arbitrator decide issues of arbitrability if the arbitration clause is broadly worded. The Court in *First Options* rejected that contention, explaining that "the basic objective in this area is . . . to ensure that commercial arbitration agreements, like other contracts, "are enforced according to their terms.' " __ U.S. at __, 115 S. Ct. at 1925 (citations omitted). Thus, the district court correctly undertook to decide the issue of arbitrability.

105 F.3d at 1194.

In *E.I. DuPont de Nemours and Co., Inc. v. Martinsville Nylon Employees' Council Corp.*, 78 F.3d 578 (4th Cir. 1996), the court reviewed the arbitrator's decision regarding arbitrability on a de novo basis and *vacated* the arbitrator's jurisdictional decision, the court held:

> The arbitration clause in the collective bargaining agreement between DuPont and the Union contains no provision clearly and unmistakably agreeing to submit the question of arbitrability to arbitration. Hence, we decide whether DuPont was required to submit the dispute concerning the R & R Program to arbitration *without deferring to the decision of the arbitrator.*

78 F.3d at 578 (emphasis added).

*Davis v. Prudential Securities, Inc.*, 59 F.3d 1186 (11th Cir. 1995) provides additional authority for the Supreme Court's decision in this case. In *Davis*, the court was asked to review a district court decision confirming an arbitration award of punitive damages. The court applied a de novo standard of review to all district court legal conclusions, applied this Court's *Mastrobuono* decision, *supra*, p. 1, and affirmed the district court's decision.

In *Smith Barney, Inc. v. Sarver*, 108 F.3d 92 (6th Cir. 1997), the court observed:

> In light of the grave consequences that could potentially result from allowing the arbitrators to define the scope of their own power and authority, however, the Supreme Court has made clear that such an agreement must be "clear and unmistakable."

*Id.* at 115 S. Ct. at 1924, n.4, 108 F.3d at 96.

In *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 78 F.3d 474, (10th Cir. 1996), the court adopted Petitioner Merrill Lynch's contention that Section 15 of the NASD Code of Arbitration does not clearly and unmistakably give the arbitrator the authority to decide his own jurisdiction.

There, the court held:

> If we conclude the agreement is silent, ambiguous, or devoid of "clear and unmistakable" evidence the parties intended the arbitrators to determine the applicability of § 15 of the NASD Code, we must conclude the parties intended for the court to decide whether it applies. *First Options*, __ U.S. at __, 115 S. Ct. at 1924. Applying these principles, we conclude that the Third, Sixth, Seventh and Eleventh Circuits' interpretation of § 15 is correct. 108 F.3d at 478.

In *Geneva Securities, Inc. v. Johnson,* 1998 WL 105484 (7th Cir. 1998), the NASD arbitration panel in making its award did not indicate the extent to which is may have relied upon a claim the Court held to be time barred. The Court reversed the District Court's application of a deferential standard to the arbitrators' decision. The Court followed *Sorrells*, *supra*, p. 11 and *First Options, supra*, p. 1 and applied a de novo standard. Pursuant to Section 10(a)(4) of the FAA, the Court remanded the case to the NASD for clarification and/or modification of the award consistent with the Court's ruling concerning the time-barred claim.

*See also Aircraft Braking Systems Corp., supra*, p. 3.

When viewed in the light of the precedents discussed above, it can be seen that the Illinois Supreme Court's decision in this

case is in full accord with relevant decisions of this Court and the various Federal Courts of Appeals. The decision does not, as Petitioners assert, create new law which extends judicial review to all decisions by all arbitrators. It is not based upon a "mistake of law" or a "change in the law." The decision is an independent de novo review of the arbitrability of the claim for punitive damages based upon the contract between the parties and relevant judicial decisions under the Federal Arbitration Act. As such, the decision is in full accord with prior decisions of this Court and the various Federal Courts of Appeals, including the 7th Circuit,[12] which have vacated the arbitrability decision of an arbitrator and which have remanded the case and the parties for a rehearing before the same arbitration panel that entered the award.

## IV.

## PETITIONERS HAVE CITED NO AUTHORITY IN WHICH THE REVIEWING COURT HAS APPLIED ANY STANDARD OF REVIEW OTHER THAN A DE NOVO STANDARD AND HAS INSTEAD SIMPLY DEFERRED TO THE ARBITRATOR'S DECISION REGARDING HIS OWN JURISDICTION.

As discussed above, there is ample controlling precedent for the application of a de novo standard when reviewing an arbitrator's jurisdictional decision. There is in fact no precedent for simply deferring to an arbitrator's jurisdictional decision.

Upon examination it is clear that the cases relied upon by Petitioners to argue that the Illinois Supreme Court decision is somehow at odds with relevant decisions by various Courts of Appeal are not applicable to the facts and circumstances of this

12. *See Edward D. Jones & Co. v. Sorrells, supra.* p. 11 and *Geneva Securities v. Johnson, supra* p. 14.

case. Each of the cases cited by Petitioners is factually and procedurally distinguishable from this case. As discussed above, the issue in this case, from the outset, was whether there was an enforceable arbitration agreement between the parties to fully resolve on the merits the claim for punitive damages. Petitioners always contended that the legal effect of the *Garrity*[13] decision was to preclude the existence of such an agreement. Respondent always contended that *Garrity* did not have that effect and that Petitioners were in fact bound by the terms of the customer agreement to arbitrate to conclusion on the merits, the claim for punitive damages. While on the merits, the arbitrators found that "punitive damages should be awarded,"[14] in the face of the *Garrity* decision and their perceived lack of authority, they declined to decide upon the amount of any punitive damages and to make a further award in that amount. The dispute in this case is now and has always been whether the New York choice of law provision in the customer agreement, when coupled with the *Garrity* decision, operates to limit the power of arbitrators to hear the claim for punitive damages and to make an enforceable award of punitive damages if they find the claim to have merit. There is a clear distinction between a case like this, in which the dispute is whether the parties agreed to arbitrate to conclusion the merits of the specific claim or issue, versus a case where a legal defense such as preclusion, laches, etc. is a part of the dispute as to the merits of the claim itself. The Second Circuit made this clear in the *Belco* decision.[15] The court stated,

> The preclusion issue is not, in the words of *First Options*, a disagreement over 'whether [the parties]

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13. *Garrity v. Lyle Stuart Inc.*, 40 N.Y. 2d 354, 386 N.Y.S. 2d 831, 353 N.E. 2d 793 (1976).

14. *See* Petition herein p. 5.

15. *Nat. Union Fire Ins. v. Belco Petroleum Corp.*, 88 F.3d 129 (2d Cir. 1996).

> agreed to arbitrate the merits' of their dispute. *Id.* at __, 115 S. Ct. at 1923. Belco's claim of preclusion is a legal defense to National Union's claim. As such, it is itself a component of the dispute on the merits. Belco's attempt to characterize the preclusion issue as not related to the merits is unavailing. It is as much related to the merits as such affirmative defenses as a time limit in the arbitration agreement or laches, which are assigned to an arbitrator under a broad arbitration clause similar to the one in the AIG Policy. See *Conticommodity,* 613 F.2d at 1226 (time limitation in arbitration agreement); *Trafalgar Shipping Co. v. International Milling Co.,* 401 F.2d 568, 571-72 (2d Cir. 1968) (laches). 88 F.3d at 136.

The Court should also note that this case did not involve the affirmance or vacation of a preexisting jurisdictional decision by the arbitrator.

Similar to *Belco,* is the Third Circuit's *Peacock*[16] decision. Here, prior to the onset of any arbitration proceedings, the court was asked to decide whether there was an enforceable agreement to arbitrate and whether the defense of waiver of certain claims precluded arbitration of those claims. Similar to the *Belco* decision, the Court simply held that the question of waiver went to the merits of the claim, not to the arbitrability of the claim, and should therefore be decided by the arbitrator. The court held as follows:

> As to the waiver of state law rights unrelated to the provision of a judicial forum, we hold only that the inclusion of such waivers in a document described as a "Arbitration Agreement" cannot be asserted to

16. *Great Western Mortgage Corp. v. Peacock,* 110 F.3d 222 (3d Cir. 1997), *cert. denied,* __ U.S. __, 118 S. Ct. 299, 139 L. Ed. 2d 230.

> avoid the arbitration agreed to therein. Rather, the party challenging the validity of such waivers must present her challenge to the arbitrator, who will determine the validity and enforceability of the waiver of asserted state law rights. Thus, here we leave it to the arbitrator to determine whether Peacock has waived her right to attorney's fees (FN38) or to a two-year statute of limitations. (FN39)

110 F.3d at 232.

*Flexible Mfg. Systems Pty. Ltd.*[17] was simply another case where the arbitrator had made a final definitive ruling on the merits of a claim and, in the absence of statutory grounds under the Federal Arbitration Act, the court refused to vacate the ruling. The court said,

> It was for the arbitrator to decide who breached the agreement first, and what damages were recoverable as a consequence. The panel did so, and that was the end of it.

86 F.3d at 100. *MCI Telecommunications Corp.*[18] and *Glass v. Kidder Peabody & Co.*[19] are still other cases where the court held that affirmative defenses such as waiver and laches are issues that go to the merits of the claim and not to the arbitrability of the claim and are therefore to be left to the arbitrator.

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17. *Flexible Mfg. Systems Pty. Ltd., v. Super Products Corp.*, 86 F.3d 96 (7th Cir. 1996).

18. *MCI Telecommunications. Corp. v. Matrix Communications Corp.*, 135 F.3d 27 (1st Cir. 1998), *petition for cert. filed,* 66 USLW 3733 (Apr. 27, 1998). *See* n.12.

19. *Glass v. Kidder Peabody*, 114 F.3d 446 (4th Cir. 1997).

The cases relied upon by the Petitioners to the effect that courts will not vacate an arbitrator's decision in the absence of fraud, partiality or misconduct, mistake of law, statutory grounds under the FAA or which set out the doctrine *functus officio* apply only to matters the parties have agreed to arbitrate. However, as discussed above, when there is disagreement over whether the parties agreed to arbitrate the merits of a specific claim, unless there is a clear, unmistakable, express agreement to let the arbitrator define his own jurisdiction, the courts define his jurisdiction on an independent *de novo* basis. Accordingly, cases in the above-described category do not apply to the facts and circumstances of this case.

## CONCLUSION

For the reasons given above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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